No. 2911

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

J. W. CHAPMAN and P. R. THOMPSON, Co-partners doing business under the firm name of CHAPMAN & THOMPSON,
Plaintiffs in Error,

vs.

JAVA PACIFIC LINE, a corporation STOOMVAARTMAATS-CHAPPY NEDERLAND, a corporation, ROTTERDAMSCHE LLOYD, a corporation, JAVA-CHINA-JAPAN LYN, a corporation, BLACK COMPANY, a corporation, and WHITE COMPANY, a corporation,
Defendants in Error.

Petition for Rehearing

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PETITION FOR REHEARING.

To The Honorable, The Judges of the Circuit Court of Appeals, for the Ninth Circuit:

The plaintiffs in error, pursuant to Rule 29 of this Court, respectfully petition that a rehearing be granted of the decision rendered by this Court affirming the judgment rendered by the United States District Court for the Northern District of California.

This Court has decided that in an action *between the parties* to a written contract it is competent for one of the parties to show that the other was merely the agent of a third person. In support of this decision the Court has cited cases holding that such third person *may sue or be sued* on the written contract but no authorities are cited, and there are none, which hold that *in an action between the parties to such contract parol evidence is admissible to show that the right to enforce the contract was vested in a principal of one of the parties, whether that principal was disclosed or undisclosed.*

The decision is also based upon the assumption that when the principal is disclosed and a written contract is made in the name of an alleged agent, it is competent to show by extrinsic or parol evidence that the principal, and not the person in whose name the contract is made, is entitled to enforce the contract and is subject to its burdens.

The decision is also based upon the assumption that in the case at bar the extrinsic or parol evidence introduced at the trial of this action showed without conflict that the contract was entered into for the benefit of the Pacific Coast Steel Company and that the plaintiffs had no personal interest therein.

It is respectfully submitted that:

1. *Parol evidence to show that a person in whose name a written contract is made was in fact merely the agent of a principal, disclosed or undisclosed, is never admissible where the controversy is between the parties to the written contract.*

2. *The decision in Ferguson v. McBean,* 91 *Cal.* 63, *is not illogical, and is, in fact, directly in line with the decision of the Supreme Court in Ford v. Williams,* 21 *How.* 287, 289.

3. *Even if, in this case, evidence was admissible to show that the plaintiffs were not entitled to enforce the contract, the evidence in the Record is clearly conflicting and the issue should have been submitted to the jury.*

The argument in this petition will be made under the foregoing heads.

1. **Parol evidence to show that a person in whose name a written contract is made was in fact merely the agent of a principal, disclosed or undisclosed, is never admissible where the controversy is between the parties to the written contract.**

We were so confident that the case of *Ferguson* v. *McBean,* 91 Cal. 63, *supra,* correctly stated the law that we did not deem it necessary in our brief to point out the limitations of the rule permitting it to be shown by parol evidence that a written contract was made for the benefit of a principal of one of the parties. The failure to do so, however, was due mainly to the fact that neither at the trial, nor in this Court, did counsel for defendants in error dispute the law as stated in *Ferguson* v. *McBean, supra.*

We felt so confident that such evidence was admissible in no case where the alleged principal was disclosed that we neglected to point out to the Court that the rule permitting parol evidence *is never applicable where, as here, the controversy is between the parties to the written contract.*

Where a written contract is made in the name of an agent and the agent is sued thereon by the party with whom he contracted, the agent cannot show that the contract was made for the benefit of a principal, disclosed or undisclosed, *nor, in such a case, can the party with whom the agent contracted, when sued by the agent, show that the agent made the contract for a principal, disclosed or undisclosed.*

In its opinion the Court has held that parol evidence is admissible to show that the Pacific Coast Steel Company, not Chapman & Thompson, is the

person beneficially interested in the contract evidenced by the two letters of January 27th and February 12th.

In support of such holding this Court has cited cases holding that *in a suit by or against the disclosed principal parol evidence is admissible to show that the disclosed principal was the person beneficially interested in the contract, but no authorities are cited that in a suit between the parties to the written contract such evidence is admissible.*

This is a suit *between the parties to the written contract and under all the authorities such evidence is not admissible.* If the Java Pacific Line had sued Chapman & Thompson on this contract, Chapman & Thompson could not have shown that the contract was made for the benefit of the Steel Company. Nor in this case where the Java Pacific Line is sued on the contract can it be permitted to show that the contract was made for the benefit of the Steel Company.

The rule adopted by some courts, allowing parol evidence in the case of a disclosed principal, has never been, and cannot be, applied in a case where the controversy is between the parties to the written contract.

In *Nash* v. *Towne,* 5 Wall. 689, 703, 704, the Supreme Court said:

> "Where a simple contract, other than a bill or note, is made by an agent, the principal whom he represents may in general maintain an action upon it in his own name, and parol evidence is

admissible, although the contract is in writing, to show that the person named in the contract was an agent, and that he was acting for his principal. Such evidence, says Baron Parke, *does not deny that the contract binds those whom on its face it purports to bind,* but shows that it also binds another, and that principle has been fully adopted by this Court.

Cases may be found, also, where it is held that the plaintiff may prove by parol that the other contracting party named in the contract was but the agent of an undisclosed principal, and in that state of the case he may have his remedy against either, at his election.

Evidence to that effect will be admitted to charge the principal or to enable him to sue in his own name, but the agent who binds himself is never allowed to contradict the writing by proving that he contracted only as agent, and not as principal."

So in a case where the agent sues the person with whom the written contract is made, *such person will not be allowed to contradict the writing by proving that the plaintiff contracted only as agent, and not as principal.*

In *Rose's Notes* on the United States Reports the author cites *Tannant* v. *National Bank,* 1 Colo. 280, 9 Am. Rep. 157, as a case following the principal case and states that the Colorado Court held that "such evidence does not deny liability of the nominal contractors, but extends the liability to another."

In *Stowell* v. *Eldred,* 39 Wis. 614, 627, cited in the opinion of this Court rendered herein, it was held that where the controversy is between the parties to the written contract *neither party will be permitted*

to show that the person in whose name the contract is made was in fact but an agent and that the contract was made for the benefit of an alleged principal. In *Stowell et al.* v. *Eldred, supra,* the controversy was between Stowell et al and Eldred. Eldred claimed the benefit of a certain written contract made between Stowell et al and Farr. In holding that parol evidence was admissible to show that Farr was merely the agent of Eldred and that the contract was made for the benefit of Eldred, the Court said:

> "The true significance of the rule as applied to this case is, that Farr cannot relieve himself from liability to the plaintiffs under his agreement with them, by showing that he made the agreement merely as the agent of Eldred and for him, *nor can the plaintiffs by like proof, relieve themselves from liability to Farr.*"

In not one of the cases cited in the opinion of this Court was the controversy between the parties to the written contract. In every case the controversy was between the alleged principal (who was not a party) and one of the parties to the written contract.

In not one of the cases cited in the opinion of this Court was the controversy between the parties to the written contract. In every case the controversy was between the alleged principal (who was not a party) and one of the parties to the written contract.

In *Shuey* v. *Adair,* 18 Wash. 203, 63 Am. St. Rep. 879, 39 L. R. A. 47; 51 Pac. 373, the Court, after

citing *Nash* v. *Towne,* 5 Wall. 689, quoted from Wood's Byles on Bills and Notes as follows:

> "The rule of law as to simple contracts in writing, other than bills and notes, is that parol evidence is admissible to charge unnamed principals, and so it is to give them the benefit of the contract; but it is inadmissible for the purpose of discharging the agent, who signs as if he were principal in his own name. And the rule of law is reasonable, for in the two former cases the evidence is consistent with the instrument, *for it admits the agent to be entitled or bound;* but in the latter case such evidence would be inconsistent with the terms of the instrument."

But such evidence in the case at bar could be admitted only to show that the agent was not *entitled.*

The case of *Short* v. *Spackman,* 2 Barn. & Ad. 960, 962 (1831), is right in point. Short, the plaintiff, was employed by one Hudson to buy oils from Hudson. Short applied to the defendant, through an employee of Short's, but the defendant refused to sell to Short. However, upon being informed that Short was acting as agent for a principal, the defendant consented to sell, but made out the bought and sold notes in the name of Short. Subsequently Short's principal (one Hudson) refused to ratify the purchase, whereupon Short demanded the oils of the defendant and brought an action against him for damages for non-delivery. The defendant averred that his contract was with Hudson and not with Short. It was held that Short was entitled to recover. In so holding *Baron Parke* said:

> "*He (the defendant) was informed that there was an unknown principal, and such was the fact.* It is found that the plaintiffs were authorized by Hudson to buy the oil of the defendant, and the contract was binding both on them, and, if the defendant chose to enforce it, on Hudson. *Then it is said the contract was put an end to by what is called the repudiation on Hudson's part: that is, by his informing the plaintiffs that he would have nothing more to do with the purchase or sale, and by their acquiescing in such determination. But this is no more, in effect, than if Hudson had thought proper to sell the benefit of his contract to any other person, which he might have done without the consent of the plaintiffs: and his doing so would have been nothing to the defendant. It clearly would not have determined the contract.*"

Baron Parke was the same Justice who delivered the opinion in *Higgins* v. *Senior,* 8 Mees. & W. 834, 844, which is the leading case on the question as to the right of an undisclosed principal to enforce performance of a written contract made in the name of his agent.

In *Kelly* v. *Barber Asphalt Co.,* 211 N. Y. 68 (105 N. E. 88), the Court of Appeals of New York said:

> "The defendant was contracting with the precise person with whom it intended to contract. It was contracting with Booth (the agent of plaintiff who was the undisclosed principal). It gained whatever benefit it may have contemplated from his character and substance. (*Humble* v. *Hunter,* 12 Ad. & El. N. S. 311; *Arkansas Smelting Co.* v. *Belden,* 127 U. S. 379, 387; *American Colortype Co.* v. *Continental Oil Co.,* 188 U. S. 104.) An agent who contracts in

> his own name for an undisclosed principal does not cease to be a party because of his agency. (*Higgins* v. *Senior,* 8 M. & W. 834, 844.) *Indeed, such an agent, having made himself personally liable, may enforce the contract although the principal has renounced it.* (*Short* v. *Spackman,* 2 B. & Ad. 962)."

Is it conceivable that the only result of making this contract in the name of the plaintiffs is that the plaintiffs thereby rendered themselves liable to respond in damages for non-performance? Are they entitled to no benefit by reason of having assumed this obligation? Are not the obligations of all contracts mutual? Is it conceivable that a party is bound to perform and yet cannot insist on performance by the other party?

Where a written contract is made in the name of an agent the agent is bound to render performance to the person with whom he contracted. Conversely the other party is bound to render performance to the agent—the person with whom he contracted. Such other party in so rendering performance is only doing what he contracted in writing to do. The fact that he may be entitled to enforce performance from a person with whom he did not contract does not absolve him from rendering performance to the person with whom he did contract.

Conceding that the Java Pacific Line might have sued the Steel Company for the freight money under this contract, and conceding that the Steel Company could have sued the Java Pacific Line for breach of the contract in the event the Java Pacific Line refused to perform, it by no means follows that where

the Java Pacific Line repudiates the written contract which it made with Chapman & Thompson, and an action is brought by Chapman & Thompson for damages, that the Java Pacific Line can defend the action on the ground that they are liable not to Chapman & Thompson but only to the Steel Company.

In the case at bar Chapman & Thompson, the persons with whom the defendants contracted, were demanding performance of the defendants. The defendants attempted to escape liability by alleging that they were not liable to the persons with whom they contracted, but to the Steel Company. This is a very different matter from enforcing the claim of the defendants against the Steel Company.

In a case where it was the intention of both parties to a written contract that one of the parties who signed as principal was merely the agent of a disclosed principal, it may be contended that it is a hardship to permit the agent in whose name the contract is made to hold liable the other party to the contract. But the hardship is not as great as that which results from holding personally liable the alleged agent in whose name the contract is made. In the case at bar (assuming for the sake of the argument that the evidence showed without conflict that it was the intention of the parties that the contract was made for the benefit of the Steel Company) it would not be as great a hardship for the Java Pacific Line to render performance to Chapman & Thompson as it would be for Chapman & Thompson to render performance to the Java Pacific

Line. It perhaps does not matter much to a carrier, who ships the freight so long as the carrier receives the agreed compensation for the transportation, but it would have greatly mattered to Chapman & Thompson if they had been compelled to pay the transportation charges in a case where for some reason it was found impossible to actually utilize the space which was reserved, and where the carrier's compensation would have to be paid for "dead freight."

If Chapman & Thompson had requested that the freight of the Steel Company should be accepted under their contract, or if Chapman & Thompson, with knowledge that Steel Company was claiming the right to ship, made no objection, these facts could be set up as a defense to any action by Chapman & Thompson and would estop them from prosecuting an action for damages.

But if against the consent of Chapman & Thompson, and with knowledge that Chapman & Thompson claimed that the Steel Company was not entitled to ship freight under the contract, the Java Pacific Line should, nevertheless, accept freight of the Steel Company, they would do so at their peril for they had contracted with Chapman & Thompson and were liable to Chapman & Thompson. If they performed to a person designated by Chapman & Thompson (whether the designation was made before or after the contract was entered into) the defendants would not be liable to the plaintiffs, but they would not escape liability in a case where they rendered performance to a person whom they knew Chapman & Thompson claimed was not entitled to accept performance.

So, too, if the Steel Company executed a release to Java Pacific Line, with the knowledge and consent of plaintiffs, the plaintiffs would be estopped to assert the right to enforce the contract against the Java Pacific Line.

But such defenses would not be based upon an attempt to vary the written contract by denying liability to the person with whom the defendant contracted. The defendant in the supposed cases would admit that he was liable to the plaintiff, but would show that plaintiff was estopped to enforce the contract against the defendant. Such estoppel would have to be pleaded as a separate defense to the action.

But Chapman & Thompson have done no act which estops them to enforce their legal rights against the defendants. Before the repudiation they wrote to defendants requesting permission to ship freight of the Studebaker Corporation under their contract (Letter of February 25, Record p. 6). The letters from plaintiffs' attorney to defendants and to defendants' attorney clearly stated the position of the plaintiffs (Record pp. 106-112). Furthermore, the defendants were furnished with a letter written by the Steel Company expressly disclaiming that the Steel Company was the principal of the plaintiffs under the contract (Record p. 92).

The defendants had clear and explicit notice that the plaintiffs were insisting that performance be rendered to them. The defendants knew that the plaintiffs were liable to them under the contract; they knew that they were liable to the plaintiffs;

and they knew that plaintiffs were insisting upon performance.

This same rule of law would be applicable in a case where (as in *Nash* v. *Towne,* 5 Wall 689, *supra*) the third party sued the agent in whose name the contract was made. Although in such a case parol evidence cannot be introduced to show that it was the intention to bind a third person as principal, nevertheless it would be competent for the agent to show that the plaintiff accepted performance from the alleged principal. Such evidence would raise an estoppel *in pais,* for it would be inequitable that a party should be allowed to thus accept performance, and at the same time hold liable the person in whose name the contract was made.

In this case the Steel Company was not claiming any rights under the contract evidenced by the letters of January 27th and February 12th. On March 3rd (Record pg. 90) they wrote to defendants and claimed right to ship 400 tons in March under an oral understanding referred to in letter of December 24th from plaintiffs to defendants. The Steel Company did not claim that they were entitled to the space under the written contract between the parties to this action. This was not even a case where the alleged principal asserted that the contract was his and refused to perform. The alleged principal expressly disclaimed any rights under the contract (Letter of March 1 to plaintiffs).†

This case is the converse of *Nash* v. *Towne,* 5 Wall. 689, 703, 704, *supra.* In *Nash* v. *Towne,* the agent in whose name the written contract was made was not permitted to show that it was understood he was contracting for the benefit of a disclosed principal. If the contract in *Nash* v. *Towne* had been by parol the agent could have so shown. So in the case at bar if the contract had been by parol

The Steel Company never claimed that they were entitled to any space for April shipment under the written contract, or otherwise; nor did the Steel Company ever make or attempt to make any settlement with defendants based on any claims arising under the contract

the defendants would have been entitled to show (if they could) that the space was intended for the Steel Company. But in both cases the contracts were in writing and the parol evidence rule prevents either party from showing what the actual intention was.

Neither in a case like *Nash* v. *Towne,* nor in the case at bar, would evidence such as is described above be within any of the exceptions to the rule that parol evidence is inadmissible to vary a written contract. If in either case the peculiar facts render it inequitable that the party should be permitted to enforce his demand for damages, such facts can be pleaded and will constitute a defense. In either case the only way the party to the written contract can escape liability for damages is by alleging and proving facts showing that the plaintiff's demand is inequitable.

In the case at bar the defendants accepted the written promise of the plaintiffs and bound the plaintiffs to them. The obligations of a contract are mutual, and the defendants were reciprocally bound. Plaintiffs have the legal right to enforce performance, and can enforce this right unless, for a valuable consideration, they have waived it, or unless they are estopped to assert their right.

2. **The decision in Ferguson v. McBean, 91 Cal. 63, is not illogical, and is, in fact, directly in line with the decision of the Supreme Court in Ford v. Williams, 21 How. 287, 289.**

It is earnestly insisted that the rule stated in *Ferguson* v. *McBean,* 91 Cal. 55, is not illogical and that the contrary rule is not, as stated in the opinion, more just and equitable.

Furthermore, it is respectfully submitted, the Supreme Court of the United States in *Ford* v. *Williams,* 21 How. 287, 289, (62 U. S.), has, in effect held the rule stated in *Ferguson* v. *McBean, supra,* to be the correct rule.

At the outset, it may be stated that counsel for defendants in error have all along assumed that *Ferguson* v. *McBean, supra,* states the law correctly. Neither counsel for defendants in error, nor the trial court, ever maintained or held otherwise. Consequently, the matter was not discussed in the briefs or at the oral argument.

When the alleged principal is disclosed and a written contract is made with the agent in his own name, it is incompetent by extrinsic or parol evidence to show that the alleged principal is bound by the contract or is entitled to enforce its provisions, *because by entering into the written contract in the agent's name, the other party to the contract has elected to look solely to the agent. It is conclusive evidence of such election.* This is the logic of the decision in *Ferguson* v. *McBean, supra.*

In discussing this matter it must be borne in mind that in every case where such a contract is

made, the person contracting with the agent is put to his election as to whether he will hold the agent or the principal. If he holds liable the person in whose name the contract is made after he obtains knowledge of the existence and identity of the undisclosed principal, he thereby releases the undisclosed principal and if he holds the undisclosed principal liable he thereby releases the person in whose name the contract is made.

Now if a disclosed principal may enforce a written contract made in the agent's name, there is no room for the operation of doctrine of election which is inseparably connected with the rule of law that an undisclosed principal may be held liable on the contract at the election of the person with whom the agent contracted.

If in this case the Pacific Coast Steel Company could show by extrinsic or parol evidence that it is entitled to the benefits of the contract evidenced by the two letters of January 27th and February 12th, it follows that under no circumstances could the Java Pacific Line ever hold Chapman and Thompson liable on this contract.

Assume that A, the agent of B, enters the store of C, and informs C that he desires to purchase goods for the account of B, and that, with the consent of A and C, the goods are charged to A, can C be heard to say that he can hold B liable for the value of the goods?

In *Ford* v. *Williams,* 21 How. 287, 289, *supra,* the contract involved was a written one, made in the

name of the agent, the principal being undisclosed. In holding that the undisclosed principal was entitled to enforce the contract, the Supreme Court said:

> *"If a party is informed that the person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of his agency, he may elect to treat the after-discovered principal as the person with whom he contracted."*

According to defendants' contention, the defendants were informed that the persons with whom they were dealing were merely the agents for Pacific Coast Steel Company, but the defendants dealt with Chapman & Thompson personally by entering into a written contract with them and by entering the space upon defendants' books in the name of Chapman & Thompson. Therefore, under the decision of the United States Supreme Court in *Ford* v. *Williams, supra,* the Java Pacific Line "will not be allowed afterwards to charge the principal." The defendants did not deal with plaintiffs, without any disclosure of the fact of plaintiffs' agency, so, under the holding in *Ford* v. *Williams, supra,* it is not a case where the defendants can "elect to treat the after-discovered principal as the person with whom they contracted."

Now it is respectfully insisted, that the principle of the decision in *Ford* v. *Williams, supra,* must apply to the case at bar.

Chapman and Thompson, (the agents in some matters at least of Pacific Coast Steel Company) go to the place of business of Java Pacific Line, and inform the Company that they intend to reserve space for the account of Pacific Coast Steel Company. Nevertheless, the space is reserved on the books of the corporation in the name of Chapman & Thompson, and a written contract is made between the Java Pacific Line and Chapman and Thompson which on its face is a contract to reserve the space for Chapman & Thompson.

It is respectfully submitted that the case at bar cannot be distinguished from the case of *Ford* v. *Williams,* and that under the evidence in the case at bar the Java Pacific Line (quoting the language of the Supreme Court in *Ford* v. *Williams, supra,*) "will not be allowed afterwards to charge the principal."

The decision in *Ferguson* v. *McBean,* 91 Cal. 63, was based largely upon the reasoning of the decision of the Supreme Court of New Hampshire, in *Chandler* v. *Coe,* 54 N. H. 561, and the decision in the case of *Chandler* v. *Coe* was based upon the authority of *Ford* v. *Williams,* 21 How. 287, 289, *supra.*

In a case where the principal is undisclosed, the person contracting with the agent, when he obtains knowledge of the existence or identity of the principal, may elect to hold either the principal or the agent with whom he contracted; and if he holds one, he releases the other. In a case where the principal is disclosed and the person contracting

with the agent charges the goods to the agent or enters into a written contract with the agent, his election to hold the agent and release the principal is made then and there.

In such a case, as said by the Supreme Court of New Hampshire in *Chandler* v. *Coe, supra,* entering into the written contract with the agent is "conclusive evidence of such election."

In the opinion of this Court it is stated that the rule announced in *Ferguson* v. *McBean,* 91 Cal. 63, *supra,* never obtained in the Federal courts. There are but two Federal cases cited in the opinion in support of the rule adopted by this Court. In its opinion the Court cites and quotes from the opinion in *Exchange Bank* v. *Hubbard,* 62 Fed. 112, where the court said:

> "the real principal may be held although the other party knew that the person who executed as principal was in fact the agent of another."

The foregoing was merely a *dictum.* The facts of the case were that the defendants requested a firm known as Hope & Company to act as defendant's agents in the purchase of certain cotton, and to borrow money upon the credit of defendants with which to pay therefor. Hope & Company bought the cotton and in pursuance of express authority therefor, from defendants, drew certain drafts on defendants which were cashed by the plaintiff bank. Defendants promised to pay these drafts upon presentation. The money received by the Hope & Company upon cashing the drafts was

used to pay for the cotton. The defendants paid one of the drafts, but refused to pay the others.

The action was in effect one for breach of defendant's promise to accept the drafts (pg. 114). *This was the contract sued upon. It was not in writing.* The court said (pg. 114):

> "It is well settled that a promise to accept all existing bill, is, in legal effect, an acceptance, and suffices to maintain an action upon the bill in favor of any person who takes it upon the faith of the promise, whether the promise be in writing or by parol."

The court further said (pg. 115):

> *"There seems to be no reason why the plaintiff should not be entitled to recover as for a breach of the promise to accept the drafts."*

From the foregoing it will be seen that in *Exchange Bank* v. *Hubbard,* 62 Fed. 112, *supra,* there was no written contract made in the name of the agent. The Exchange Bank did not make a written contract with Hope & Company, and thereafter seek to enforce it against the defendants. On the contrary, the contract they made was an oral contract with the defendants to accept certain drafts. It follows, therefore, that the statement in the opinion of the court, quoted above, was merely a *dictum.*

In *Flower* v. *Commercial Trust Co.,* 223 Fed. 318, no question of agency was really involved. The contract was not made in the name of an agent with knowledge of the existence and identity of a prin-

cipal. The facts were that a certain corporation borrowed money from the Commercial Trust Company and that the Commercial Trust Company accepted the note of the president and secretary of the corporation as evidence of the indebtedness. The corporation received the money borrowed. The Commercial Trust Company was not suing on the note, but based its claim against the corporation on the common count for money had and received.

The courts have uniformly construed the decision in Ford v. *Williams,* 21 *How.* 287, *supra, as holding that where the name and identity of the alleged principal are disclosed and a written contract is made in the name of the agent, the person contracting with the agent will not be allowed afterwards to charge the principal.*

In *Schenck* v. *Spring Lake,* 19 Atl. 881, 882, (N. J. Eq.), the Chancellor said:

> "For aught that appears in the bill, the contract may have been drawn by the complainant himself, or under his direction, and his purpose in putting it in the form in which it is, *may have been to charge the agent, and not his principal.* If such was his purpose, he cannot now be allowed, according to the rule laid down in *Ford* v. *Williams,* 21 How. 287-289, to charge the principal. In that case it is said: 'If a party is informed that a person with whom he is dealing is merely the agent for another, and prefers to deal with the agent personally on his own credit, he will not be allowed afterwards to charge the principal; but when he deals with the agent, without any disclosure of the fact of the agency, he may elect to treat the after-

disclosed principal as the person with whom he contracted."

In *Rice* v. *Bush,* 27 Pac. 720, 722, 723, the Supreme Court of Colorado cited *Ford* v. *Williams,* 21 How. 287, in support of the following statement:

> "Whatever weight there may be in arguments like the foregoing, in cases where the unnamed principal is also unknown to the other contracting party, *the reasoning loses its force whenever it appears that the real principal, though known at the time of making the contract or memorandum, was not named, nor in any manner designated or referred to therein.* In the record before us it affirmatively appears by the plaintiff's own pleadings that he knew at the time of entering into the contract with Mr. Bush—at the very time of making the first agreement—that Mr. Teller was an owner of the property contracted for, and the only one who could convey the legal title thereto. Under such circumstances, if plaintiff desired the contract to bind Mr. Teller, he should have required the same to be drawn in such terms as would express that intent and effectuate that purpose. The plaintiff had full knowledge as to the ownership and title of the property contracted for, as we must assume from the complaint. Therefore, by accepting the individual contract of Mr. Bush, instead of requiring the contract to be executed also by or on behalf of Mr. Teller, the plaintiff must be held to have relied on the individual covenants and personal responsibility of Mr. Bush in case of a breach of such contract, and his remedy must be limited accordingly."

Chandler v. *Coe,* 54 N. H. 561 (upon which the Supreme Court of California based its decision in *Ferguson* v. *McBean,* 91 Cal. 63, *supra*), was also cited, together with *Ford* v. *Williams, supra,* in support of the statement quoted above.

In *McIntosh* v. *Rice,* 58 Pac. 358, 362, (Colo.), the court, after citing *Ford* v. *Williams,* 21 How. 287, *supra,* and the case of *Rice* v. *Bush,* 27 Pac. 720, (Colo.), *supra,* with reference to the last mentioned case, said:

> "As we read that case it unquestionably holds that a principal known when the agent is made, but who is not named, nor in any manner designated or referred to in the agreement, is not bound."

In *Coleman* v. *First National Bank of Elmira,* 53 N. Y. 388 (cited in the note to 39 Am. Rep. 761), the court cited *Ford* v. *Williams, supra,* in support of the following statement of the law:

> "The rule does not preclude a party, who has entered into a written contract with an agent, from maintaining an action against the principal, upon parol proof that the contract was made in fact for the principal, where the agency was not disclosed by the contract, *and was not known to the plaintiff when it was made,* or where there was no intention to rely upon the credit of the agent to the exclusion of the principal. Such proof does not contradict the written contract. It superadds a liability against the principal to that existing against the agent. That parol evidence may be introduced in such a case to charge the principal while it would be inadmissible to discharge the agent, is well settled by authority."

In the opinion it is stated that in *Curran* v. *Holland,* 141 Cal. 437, the Supreme Court of California in effect overruled *Ferguson* v. *McBean.* In *Curran* v. *Holland, supra,* the alleged agent signed the contract in his name *"for the purpose of keeping secret the name of the defendant"* (p. 438). In *Curran* v. *Holland, supra,* the principal was undisclosed. Any statement which the court might have made implying that parol evidence was admissible when the principal was disclosed would have been merely a *dictum.* But the court did not make such a statement, but merely quoted an excerpt from *Reinhard on Agency,* which excerpt contained a statement that parol evidence is "admissible to charge with liability an undisclosed principal, or one who though disclosed is not named in the instrument."

This action was originally begun in the State court and was removed to the Federal court on the ground of diversity of citizenship. If it had remained in the State court doubtless the decision in *Ferguson* v. *McBean* would have been held authoritative. In view of this decision, it is suggested that the comity which exists between the Federal courts and State courts should impel this Court to follow that decision. Assuming for the sake of the argument that *Ford* v. *Williams, supra,* is not direct authority in support of the position assumed by plaintiffs in error, the question is, nevertheless, a doubtful one which courts of the highest authority have decided both ways. In fact there are more cases holding with *Ferguson* v. *McBean* than there are *contra.* In only three of the cases cited in the opinion of this Court was the question directly involved.

In *Burgess* v. *Seligman,* 107 U. S. 120, the Supreme Court said:

> "For the sake of harmony and to avoid confusion, the Federal courts will lean toward an agreement in views with the State court *if the question seems to them balanced with doubt.* Acting on these principles, founded as they are on comity and good sense, the courts of the United States, without sacrificing their own dignity as independent tribunals, endeavor to avoid, and in most cases do avoid, any unseemly conflict with the well considered decisions of the State courts."

In *Supervisors* v. *Schneck,* 5 Wall. 772, 783, the Supreme Court in considering a question of commercial law said:

> "Prior decisions of the State court were in accordance with the decisions of this Court, and as those decisions were supposed to be correct expositions of the law of the State at the period when these bonds were issued, the latter adjudications cannot control the payment in this case."

In *Brown* v. *Grand Rapids,* 58 Fed. 286, (C. C. A.), Judge Taft said:

> "It has been argued that upon this question the court should reach a conclusion as upon a doctrine of general law, and not be governed by the decisions of the Supreme Court of Michigan. Whether this be true or not, *it is the duty of the court, where the matter is one of doubt, to lean toward the decision of the State Court."*

In this case it will be observed that the decision of the State court was rendered years before the contract here involved was entered into. This has always been a consideration which has impelled the Federal courts to follow the State decision. Even where the State court subsequently reaches a different conclusion, the earlier decisions have been followed by the Federal courts upon the assumption that the contract was made with such decisions in contemplation.

3. Even if, in this case, evidence was admissible to show that the plaintiffs were not entitled to enforce the contract, the evidence in the Record is clearly conflicting and the issue should have been submitted to the jury.

It is respectfully submitted that this Court has inadvertently overlooked the fact that there is evidence in the record to the effect that this contract was made for the benefit of Chapman & Thompson and that the question as to who was beneficially interested in the contract should have been submitted to the jury.

This evidence was referred to in the brief of plaintiffs in error, but we felt so confident of the strength of our position that parol and extrinsic evidence was not admissible that no extended argument was made on this point.

The evidence referred to consisted not only of the letter of January 22nd, mentioned at pages 7 and 8 of the opinion, but also of the oral testimony of Mr. J. W. Chapman, one of the plaintiffs.

In the opinion of the Court, it is stated:

> "The plaintiffs were traffic managers of the Pacific Coast Steel Company. It is not denied that in that capacity, they acted in all negotiations with defendants prior to the letter of January 27, 1916."

Now, it is respectfully submitted, it is shown by the evidence that the plaintiffs were not only the traffic managers of Pacific Coast Steel Company, but were *brokers,* and that prior to January 27, 1916, they were acting for themselves, and not for

the Steel Company, in the matter of the reservation of this space.

J. W. Chapman testified as follows, on direct examination (Record pg. 40):

> "During the past year and a half or two years, I have been engaged in brokerage business, representing a number of firms in San Francisco, handling their transporation matters for them; among the firms I have represented is Guggenhime & Co. * * * I represented the Pacific Coast Steel Company, who do an export business to the Orient."

On cross-examination, J. W. Chapman testified as follows (Record pg. 44):

> "MR. FRANK: I understand you to say, Mr. Chapman, that you were traffic manager for quite a number of firms.
>
> "A. I handled their transportation matters for them, yes sir.
>
> "THE COURT: He said as a broker.
>
> "A. (continuing): And also doing a brokerage business."

The evidence showing that the time of the writing of the letters of January 27th and February 12th Chapman & Thompson were acting for themselves in the matters of the reservation of this space, and not for the Steel Company, is as follows:

> "MR. CHAPMAN: On the 15th of January I called at the office of the Java Pacific. * * *

I said to Mr. Edwards, *'you understand that all of these bookings are for Chapman & Thompson.'*

"Q. *What did he say?*

"A. *He replied, 'yes' and showed me the book.*" (Record pp. 119-120.)

Mr. Chapman further testified:

"Q. Now, did you have a conversation with Mr. Connor over the 'phone about the 20th of January, 1916?

"A. Yes, about that date.

"Q. State what Mr. Connor said to you on the 'phone and what you said to him?

"A. *Mr. Connor asked who would ship the* 1110 *tons on the February steamer,* and I replied that it would be shipped by the Pacific Coast Steel Company. Connor then requested us a letter direct from the Pacific Coast Steel Company to the Java-Pacific Line confirming the bookings, and that they would ship." (Record p. 120.)

If it was understood by the defendants that this space was reserved for the account of the Steel Company, is it conceivable that Mr. Connor would have asked Mr. Chapman who would ship the freight? Although it is immaterial, it may be noted that Mr. Connor did not deny that he made this inquiry.

Mr. Chapman's attention was called to the letter of January 22 from the defendants, referring to

conversation of the preceding day, stating that the space was reserved "in your name." Concerning the conversation referred to in this letter, Mr. Chapman testified:

> "Q. Referring to that conversation which must have been according to that letter the 21st of January, will you state what that conversation was with Mr. Edwards?
>
> "A. Mr. Edwards called at the office of Chapman & Thompson in the Fife Building. I requested him to furnish me a list of confirmation of all of the bookings and reservations for Chapman & Thompson for the various months.
>
> "Q. What else did you say, if anything?
>
> "A. *At the same time I stated to Mr. Edwards again, 'You understand these bookings are all for Chapman & Thompson.'*
>
> "THE COURT: Q. How did you come to make a statement of that kind, with nothing said on the other side—you had had a lot of dealings with him, hadn't you?
>
> "A. Yes, but prior to that it was expected that the Pacific Coast Steel Company would use all or a good part of that space; just prior to the 15th of January they advised us that they would not want it all.
>
> "Q. Did you ever advise the defendant of that fact?
>
> "A. No, I did not." (Record pp. 120-121.)

Mr. Edwards was not called as a witness, and this testimony is undisputed.

Mr. Chapman further testified:

"Q. On or about the 10th of January did you have a conversation with Mr. Fred Connor?

"A. I did.

"Q. Where?

"A. On the floor of the Merchants' Exchange Building.

"Q. What was said by you and by Mr. Connor at that conversation?

"A. *Mr. Connor asked me who would ship the freight on the bookings made by Chapman & Thompson; I replied that we were booking cargo for several local firms, also for some Eastern firms; Connor replied that he would want to be furnished with letters direct from the parties who would actually ship the freight, just prior or a short time prior to the sailing of the steamship.*" (Record pp. 121-122.)

On cross-examination, Mr. Chapman was shown defendant's exhibit "H" which was a notice setting forth a copy of a letter dated March 1, 1916, from Pacific Coast Steel Company to plaintiffs, which letter stated that the Pacific Coast Steel Company was not the principal of plaintiffs. After having his attention called to this notice and letter, Mr. Chapman testified:

"Mr. Frank: Q. Now, that is the first notice that you ever gave to the Java Pacific Line that the Pacific Coast Steel Company did not want that space, isn't it?

"A. No, I would not say so; *when I stated to the Java Pacific Line about the end of January that they understood that all of these bookings were for Chapman & Thompson, I considered that was sufficient notice;* the Java-Pacific line understood very clearly.

"A. Never mind what they understood. We will conclude what they understood. That is the conversation you had?

"A. Yes.

"Q. And this is the first direct notice that you gave them of the fact that the Pacific Coast Steel Company were not going to take that space?

"A. The first notice in writing; I had given them verbal notice.

"Mr. Frank: Q. You do not mean to tell us that you had ever told them distinctly and in so many words that Pacific Coast Steel Company was not going to fill on this, but *you say you told them that you wanted them to understand these bookings were for yourself, and that you thought was sufficient?*

"A. *Yes.*

"Q. You mean by that you had notified them?

"A. Yes." (Record pp. 138-139.)

How can it be said that when the letter of January 27th was written by the plaintiffs and when the reply of February 12th was written by defendants, it was intended that the space was for the Steel

Company, when on January 15th Mr. Chapman stated to defendants' representative *"you understand all these bookings are for Chapman & Thompson?" and received a reply in the affirmative and was shown the book containing a memorandum of the reservations in the name of Chapman & Thompson?*

If it was intended that this space was solely for the account of the Steel Company, *why did Mr. Connor on January 20th and again on February 10th, ask Mr. Chapman who would ship the* 1100 *tons on the February steamer?*

The statement that the bookings were for Chapman & Thompson could have had but one meaning. Prior to the time that this statement was made, the bookings were "for account of Pacific Coast Steel Company."

Unquestionably when Mr. Chapman on January 21st stated to Mr. Edwards "you understand these bookings are all for Chapman & Thompson," he was changing the reservation of the space from the Steel Company to Chapman & Thompson.

At the trial, counsel for defendants clearly understood that such was the effect of Mr. Chapman's testimony. Mr. Frank, on the cross-examination of Mr. Chapman, asked the following question: "You say you told them that you wanted them to understand these bookings were for *yourself?"* Mr. Chapman's answer to this question was "Yes." (Record p. 139.)

The fact as shown by defendants' own letter of January 22nd, that the space was reserved in the name of Chapman & Thompson is also, in view of the oral testimony in the case, most material as showing for whom the space was intended to be reserved. *Is it conceivable that when the space was originally reserved* (as shown by the letters written prior to January 10th) *"for the account of Pacific Coast Steel Company" that it was reserved on defendants' books in the name of Chapman & Thompson?* It is very improbable that the space was originally reserved in the name of Chapman & Thompson. The most natural thing for the defendants to do would have been to enter it in their records in the name of the Pacific Coast Steel Company.

The jury should have been permitted to determine the issue in this case. Not only did the oral testimony render it necessary to submit the case to the jury, but the written evidence raised a presumption that the space was reserved for the plaintiffs. Such was the presumption which arose from proof of the written contract evidenced by the letters of January 27th and February 12th.

In *Byington* v. *Simpson,* 134 Mass. 169, 170, cited in the opinion filed herein, the court said:

> "The most that could fairly be argued in any case would be, that, under some circumstances proof that the other party knew of the agency, and yet accepted a writing that did not refer to it, and which in its natural sense bound the agent alone, might tend to show that the contract was not made with any one but the party

> whose name was signed; that the agent did not sign as agent, and was not understood to do so, but was himself the principal. But these are questions of fact."

So in *Barbre* v. *Goodale,* 28 Oregon 465, cited in the opinion, the court held that the execution of a contract in the name of the agent made the contract presumptively the contract of the agent.

It is respectfully submitted that this Court has erroneously assumed that this is a case where the contract was made in the name of the agent, and the evidence showed, without conflict, that the agent had no personal interest in its subject matter. Such is not the case, for here, before the written contract in the agent's name was consummated, the very matter as to who should be entitled to the benefits of the contract was discussed. Both the oral and written evidence support the presumption of law that the contract was for the benefit of Chapman & Thompson. Clearly the issue should have been submitted to the jury.

It is respectfully submitted that a rehearing should be granted in this case for the following reasons:

> 1. In a controversy between the parties to a written contract, parol or extrinsic evidence is inadmissible to show that one of the parties contracted for the benefit of a third person and that such third person, and not the party to the contract, is entitled to its benefits. *Short* v. *Spackman,* 2 Barn. & Ad. 960, 962, holds that

the defense attempted to be made in the case at bar is futile. *Short* v. *Spackman* apparently is the only case which ever came before the courts where the facts were similar to those in the case at bar. There are no cases holding that in an action between the parties to a written contract parol or extrinsic evidence is admissible to show that one of the parties is merely the agent of a third person. *Nash* v. *Towne,* 5 Wall. 689, 703, 704, and the many other cases holding to the same effect as *Nash* v. *Towne* cannot be distinguished from the case at bar. In the case of *Stowell* v. *Eldred,* 39 Wis. 614, 627, cited in the opinion of this Court, it is stated that a person who enters into a written contract with an agent cannot relieve himself from liability by showing that the person with whom he contracted was merely the agent of a third person. The obligations of a contract are mutual. The plaintiffs were absolutely bound to the defendants by the written contract; the defendants must be equally bound to the plaintiffs.

2. The case of *Ford* v. *Williams,* 21 How. 287, in principle, supports the decision in *Ferguson* v. *McBean,* 91 Cal. 63.

3. This Court has inadvertently failed to consider the evidence which shows that Chapman & Thompson clearly stated to defendants that the space was to be for the plaintiffs personally.

Respectfully submitted,

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